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Before the
Federal Communications Commission
Washington, DC 20554

JUN 26 1998

Federal Communications Commission
Office of Secretary

In the Matter of

Implementation of the
Telecommunications Act of 1996:

Telecommunications Carriers' Use of
Customer Proprietary Network
Information and Other Customer
Information

CC Docket No. 96-115

GTE COMMENTS/OPPOSITION TO THE PETITIONS FOR RECONSIDERATION

GTE SERVICE CORPORATION, AND ITS
AFFILIATED DOMESTIC TELECOMMUNICATIONS,
WIRELESS, AND LONG DISTANCE COMPANIES

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SUMMARY

The *Second CPNI R&O* places unnecessary, anticompetitive burdens on carriers that will negatively impact the telecommunications industry and ultimately harm consumers. The Commission should eliminate several of its rules now to avoid costly, prolonged litigation. The Commission should abandon:

- rule 64.2005(b)(1) to the extent it prohibits the use of CPNI, without prior approval, for the joint marketing of telecommunications and its related equipment;
- rule 64.2005(b)(1) to the extent it prohibits the use of CPNI, without prior approval, for the joint marketing of telecommunications and information services
- rule 64.2005(b)(3) to the extent it prohibits “win back” efforts by carriers; and
- rule 64.2007 to the extent it sets up an unnecessary web of approval requirements.

Customers expect carriers to use CPNI to market CPE. However, the Commission’s rules are out of step with this market reality to the extent they require carriers to obtain customer approval before using CPNI to market customer equipment. Thus, CPE should be considered to be within the total offering. Similarly, telecommunications services and information services are so closely related that they should be treated as within the same total service package.

The “anti-win back” rule burdens competition for telecommunications services with no offsetting benefit for consumer expectations of privacy. It denies carriers the

opportunity to improve their service or to develop a competitive alternative for the customer. It also denies customers the benefits of competition.

Carriers should not be required to instruct customers of their CPNI rights in the same communication in which they solicit customer business.

The Commission should not impose different CPNI requirements on incumbent LECs. The Commission correctly concluded that Section 222 reflects Congress' intent that, with limited exceptions, all carriers be subject to the same CPNI requirements. CPNI should not become the vehicle by which the Commission handicaps certain carriers in order to promote the success of others.

The electronic tracking and audit requirements would be unduly burdensome, extremely costly, overbroad, and of dubious efficacy in advancing the Commission's stated purposes. The Commission grossly underestimated the cost to carriers of compliance. If the Commission requires electronic auditing and tracking it should clarify that it only applies when final customer account record systems are accessed for marketing, sales, or account inquiry purposes.

Requiring an ILEC to disclose CPNI to a third party merely based upon that party's oral representation that a customer has authorized the release of his CPNI would impermissibly erode the protections of Section 222 envisioned by Congress. Moreover, PIC and PIC-freeze information is included within the statutory definition of CPNI and carriers should not be required to disclose such information to other carriers without the required approval.

Finally, written customer approvals after the carrier gave written notice of CPNI rights that were obtained prior to the *Second CPNI R&O* should be grandfathered.

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GTE COMMENTS/OPPOSITION TO PETITIONS FOR RECONSIDERATION

GTE Service Corporation and its affiliated domestic telecommunications,¹
wireless,² and long distance³ companies (collectively "GTE") hereby submit these

¹ GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc. and GTE Communications Corporation.

² GTE Wireless Incorporated and GTE Airfone Incorporated.

³ GTE Communications Corporation, Long Distance division.

comments and opposition to the petitions for reconsideration of the *Second CPNI R&O*.⁴

I. ALL SEGMENTS OF THE TELECOMMUNICATIONS INDUSTRY AGREE THAT THE COMMISSION'S CPNI RULES GO FAR BEYOND STATUTORY REQUIREMENTS AND WILL HARM COMPETITION.

An extensive record had been developed which demonstrates that, without sufficient justification, the *Second CPNI R&O* inexplicably departs from the requirements of the Communications Act.⁵ In an ironic twist, the CPNI rules run roughshod over the legitimate expectations of consumers in the name of consumer protection.⁶ As demonstrated in the record before the Commission, the *Second CPNI R&O* places unnecessary, anticompetitive burdens on carriers that will negatively impact the telecommunications industry and ultimately harm consumers. The over-reaching of the *Second CPNI R&O*, therefore, violates congressional intent, prior

⁴ Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061 (1998) ("*Second CPNI R&O*").

⁵ See 360° Communications Company (360° Communications) at 3-4, ALLTEL at 4, Bell Atlantic at 3-5, BellSouth at 2-3, Comcast Cellular at 6-7, Cellular Telecommunication Industry Association ("CTIA") at 14-17, Frontier at 1, GTE at 6-10, LCI International at 8, Metrocall at 4, National Telephone Cooperative Association ("NTCA") at 4, Omnipoint at 5-6, Paging Network at 2, Personal Communications Industry Association ("PCIA") at 8, RAM Technologies at 3-4, SBC Communications at 8-10, TDS Telecommunications at 2-5, The Independent Alliance at 2-4, and Vanguard Cellular Systems at 4-7. All of the pleadings referred to within this document are Petitions for Reconsideration of the Commission's Second CPNI R&O filed on May 26, 1998.

⁶ See 360° Communications at 5-8, Ameritech at 7, BellSouth at 3-5, 14-18, Comcast Cellular at 9-10, CommNet Cellular at 5-8, CTIA at 17-20, GTE at 4-6, 12-15, NTCA at 5, Paging Network at 4, and PCIA at 6.

Commission precedent and the Administrative Procedure Act ("APA"). In addition, the CPNI rules may also violate the U.S. Constitution.⁷

In the light of the precarious legal basis for its CPNI rules, the Commission should eliminate several of its rules now to avoid costly, prolonged litigation.⁸ Specifically, the Commission should abandon: (1) Section 64.2005(b)(1) to the extent it prohibits the use of CPNI, without prior approval, for the joint marketing of telecommunications and its related equipment; (2) Section 64.2005(b)(1) to the extent it prohibits the use of CPNI, without prior approval, for the joint marketing of telecommunications and information services ; (3) Section 64.2005(b)(3) to the extent it prohibits "win back" efforts by carriers; and (4) Section 64.2007 to the extent it sets up an unnecessary web of approval requirements.

A. Telecommunications Providers Should Be Able To Use CPNI Freely To Market Bundles that Include CPE.

The record in this proceeding provides ample support for allowing telecommunications providers to use CPNI, without prior customer approval, to jointly market services and equipment.⁹ GTE urges the Commission to carefully consider the following two bases for eliminating rule 64.2005(b)(1): (i) customers expect carriers to

⁷ See BellSouth at 18, GTE at 36-37.

⁸ The Commission's CPNI rules are already subject to a federal law suit. *US West v. FCC*, Case No. 98-9518 (10th Cir. 1998).

⁹ See 360° Communications at 5-6, ALLTEL at 6, BellSouth at 14-16, Comcast Cellular at 2-4, CommNet Cellular at 2-3, CTIA at 7-10, Frontier at 10-11, GTE at 6-10, Metrocall at 6-9, NTCA at 6, Omnipoint at 6-7, Paging Network at 4-6, PCIA at 11-13, SBC Communications at 3, and Vanguard Cellular Systems at 9-12.

use CPNI to market CPE; and (ii) the rule undermines well-established Commission policies.

Nearly every party in this proceeding agrees that customers expect carriers to use CPNI to market CPE.¹⁰ Unfortunately, the Commission's rules are out of step with this market reality to the extent they require carriers to obtain customer approval before using CPNI to market customer equipment. In reaching this decision the Commission purports to apply a "total service approach." However, the Commission's view of the total service approach is inappropriately narrow because it does not embrace CPE and information services, such as voicemail, that are reasonably related to the underlying telecommunications service.

The prohibition on the use of CPNI also undermines several pre-existing FCC CMRS policies. First, Section 64.2005(b)(1) contradicts the Commission's determination that there are "significant public interest benefits associated with the bundling of cellular CPE and service."¹¹ The prohibitions stated in the *Second CPNI R&O* run counter to the Commission's findings that bundling of CPE and CMRS inures to the benefit of both consumers and competition.¹² The *Second CPNI R&O* departs from that prior decision and would create significant barriers to efficient bundling. The Commission has failed, however, to indicate why its prior reasoning must be rejected

¹⁰ See 360° Communications at 5-6, ALLTEL at 6, BellSouth at 14-16, Comcast Cellular at 2-4, CommNet Cellular at 2-3, CTIA at 7-10, Frontier at 10-11, GTE at 6-10, Metrocall at 6-9, NTCA at 6, Omnipoint at 6-7, Paging Network at 4-6, PCIA at 11-13, SBC Communications at 3, and Vanguard Cellular Systems at 9-12.

¹¹ *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, 4030 (1992).

¹² *Id.*

now. GTE submits that, pursuant to the APA, such departures from the Commission's regulatory paradigm requires justification that is absent here. Simply abandoning long-standing policies, without adequate reasoning, is arbitrary and capricious and violates the doctrine of *stare decisis*.

Second, the anti-CPE rule ignores the Commission's consistent encouragement of CMRS providers to build out digital systems, which require new, digital CPE.¹³ Carriers have made a substantial investment in digital networks. This investment will be recouped only by allowing carriers to place a sufficient number of current analog customers and new customers on the carrier's digital network. However, to the extent that Section 64.2005(b)(1) hinders the marketing efforts of wireless carriers, these companies will be denied the benefit of an investment which the Commission encouraged them to make.

Third, as highlighted by several parties,¹⁴ the rule tramples on the Commission's determination that one-stop shopping is in the public interest because it "promotes efficiency and avoids customer confusion."¹⁵ The new rule would inevitably increase confusion and frustration among consumers by denying them the clear benefit of one-stop shopping.

¹³ See e.g., CTIA at 22 (citing 7 FCC Rcd at 4031; Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957 (1994)).

¹⁴ See CommNet Cellular at 5-8, PCIA at 4, 8-9, and SBC Communications at 4-5.

¹⁵ Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 10 FCC Rcd 11786 (1995).

Fourth, inconsistent with Commission precedent, Section 64.2005(b)(1) restricts the flexible use of CMRS spectrum, including the offering of information services.¹⁶ A more flexible rule would allow for greater efficiency, increased experimentation and the growth of consumer choice.¹⁷

The *Clarification Order*¹⁸ permits the use of customer information “independently derived from the carrier’s prior sale of CPE” to market new CPE or new CPE/CMRS packages. This would appear to resolve at least some of the practical issues faced by carriers in identifying customers who may benefit from new products and services. However, this solution is of limited use in the real world, as BellSouth explains.¹⁹ GTE cannot always identify from its current records the original source of the CPE nor make use of “independently derived” customer information. Because GTE never expected that the use of CPNI would be so restricted, it has not established a comprehensive record-keeping system to track customer information based on the purchase of CPE as distinguished from the CMRS service. By correctly recognizing that CMRS CPE is part of the total service package, the Commission can eliminate this artificial restraint on marketing mobile handsets.²⁰

¹⁶ See CTIA at 21-25.

¹⁷ However, adding free promotional items, such as a handset, does not trigger the customer approval requirement.

¹⁸ Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, Order, CC Docket No. 96-115 (rel. May 21, 1998) (*“Clarification Order”*).

¹⁹ BellSouth at 16. AT&T (at 8) also notes that use of CPNI to market handsets should not depend on whether the carrier previously supplied the handset.

²⁰ As a minimum, the Commission should allow CMRS carriers to use, without approval, the CPNI of existing CMRS customers to market CPE. Such a grandfathering
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B. Telecommunications Services and Information Services Are So Closely Related that They Should Be Treated As Within the Same Total Service Package.

The record reflects that the FCC has not explained its inconsistent treatment of directories and inside wire as "used in connection with" a telecommunications service, while excluding CPE and information services.

Information services are indistinguishable from directories.²¹ The Commission incorrectly determined that "Congress' designation of the publishing of directories as 'necessary to, or used in' the provision of a telecommunications service does not require a broad reading of section 222(c)(1)(B) that encompasses all information services."²² The Commission distinguishes directories from other information services based on its inexact conclusion that directory assistance "provides only that information about another subscriber's telephone number *which is necessary to allow use of the network* to place a call to that other subscriber."²³

Directories provide the name, phone *and* address of consumers. Address information, however, is not "necessary" to the provision of telecommunications service. Even if directories did not include address information, they are simply not an absolute

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would give carriers an opportunity to keep records of "independently derived" customer information on a going-forward basis.

²¹ See BellSouth at 7-11, Comcast Cellular at 12, CTIA at 21, and Omnipoint at 6.

²² Second CPNI R&O at ¶ 73.

²³ Second CPNI R&O at 74 citing North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, Memorandum Opinion & Order, 101 FCC 2d 349, 360 (1985) (emphasis added).

necessity for the provision of telecommunications service.²⁴ Thus, the test is not so much that the service is absolutely necessary for the provision of service. Rather, the test is whether the information service is helpful in the provision of telecommunications service. The Commission demonstrates this flexible standard where it states that the rule will be limited to adjunct-to-basic services because they are “*used in conjunction with 'voice' service.*”²⁵

Unfortunately, the Commission does not use the same flexible definition of “necessary” as it relates to other information services. Instead, the Commission argues that “most information services are not ‘used in, or necessary to’ the provision of the carrier’s telecommunications service.”²⁶ In fact, as noted by Omnipoint, CMRS information services are far more integrated into the provision of telecommunications service than the publishing of directories because customers receive their information services in an integrated package with CMRS.²⁷

²⁴ The Commission acknowledges this fact where it states that “if listings are not published, *many* calls cannot, and will not, be made.” *Second CPNI R&O* at 8119 (emphasis added).

²⁵ *Id.*

²⁶ However, under the Commission relaxed definition of “necessary,” information services are clearly deserving of the same treatment accorded directories because they are “helpful” in the provision of telecommunications services.

²⁷ See Omnipoint at 6. Similarly, CPE should be considered as part of the total service approach because CMRS handsets are the functional equivalent, in the CMRS context, of inside wiring in the wireline context. The Commission recognized the importance of inside wiring where it declared that it is “necessary to” and “used in” telecommunications. The same is true with CPE in the context of CMRS.

C. Denying Use of CPNI to Win Back Customers is Inconsistent With Section 222 and is Anticompetitive.

Commenters nearly unanimously agree that the "anti-win back" Rule burdens competition for telecommunications services with no offsetting benefit for consumer expectations of privacy.²⁸ The anti-win back provision is inconsistent with Section 222 which has neither an express nor an implied durational requirement for CPNI usage. The Commission, however, seeks to create an additional requirement that cannot be reasonably traced back to the Act. Because Section 222 permits carriers to access a former customer's information to "render" service to the customer, a correct reading of the Act would permit the use of CPNI to render service to a customer by winning back that customer.

The lack of statutory authority for the anti-win back provision is exacerbated by its anticompetitive effect.²⁹ The anti-win back rule hampers carriers by denying them the opportunity to improve their service or to develop a competitive alternative for the customer. It also denies customers the benefits of competition: obtaining the least costly and most useful service from a carrier. This, despite the fact that such win back attempts are pro-competitive and do not infringe upon a customer's privacy.³⁰

²⁸ See 360° Communications at 10, ALLTEL at 7, AT&T at 2-5, Bell Atlantic at 16-17, BellSouth at 16-18, Comcast Cellular at 2-4, CTIA at 10-13, Frontier at 7, GTE at 4-6, MCI at 49-50, Omnipoint at 17-18, Paging Network at 2-4, PCIA at 9-11, SBC Communications at 8-10, USTA at 6-8, and Vanguard Cellular Systems at 13.

²⁹ See ALLTEL at 7, AT&T at 2-5, BellSouth at 16, CTIA at 7-10 and GTE at 37-39.

³⁰ The FCC should refuse to grant Comcast's request that if the win-back rule is affirmed, it be applied to all carrier-customer changes, including landline to wireless changes.

D. Prohibiting Separate Customer Rights for Notification and Approval is Inconsistent with the Statute and Unnecessarily Rigid.

The record supports the conclusion that carriers should not be required to instruct customers of their CPNI rights in the same communication in which they solicit customer business.³¹ Indeed, such a requirement is inconsistent with other provisions of the *Second CPNI R&O* that require carriers to inform customers of their CPNI rights *before* soliciting business, and providing for *one-time* notification of CPNI rights.³²

II. THE FCC SHOULD REJECT CLEC REQUESTS TO IMPOSE DIFFERENT CPNI REQUIREMENTS ON CERTAIN CLASSES OF TELECOMMUNICATIONS CARRIERS.

In the *Second Report and Order* the Commission rejected the request of several CLECs to impose more stringent CPNI requirements on particular classes of carriers. In particular, the FCC rejected the notion that ILECs should face more restrictions on their use of CPNI than should their competitors.³³ The Commission found that Congress intended that the language of Section 222 not distinguish between different types of telecommunications carriers, except in certain limited instances where the statute clearly intended different treatment.³⁴ The FCC correctly held that treating all

³¹ See, e.g., *Frontier* at 5-7.

³² See *GTE* at 39.

³³ *Second Report and Order* at 8090-8100.

³⁴ Sections 222(c)(3) and (e) provide specific additional requirements on all LECs (not just CLECs) in their handling of aggregate customer information and subscriber list information.

telecommunications carriers the same "addresses competitive concerns" in the use and disclosure of CPNI.³⁵

Several parties argue that the Commission should interpret Section 222 to give CLECs and CMRS providers, in particular, the flexibility to provide telecommunications services and CPE and information services using CPNI, even without customer approval.³⁶ These parties also argue that there is a greater potential for abuse when ILECs use CPNI than when CLECs do.³⁷ Other parties argue that individual types of carriers should be singled out for more flexible CPNI rules.³⁸ Although GTE agrees with the goals of these competitors in seeking more flexible CPNI rules, it would be anticompetitive if such flexibility were extended only to a select few, rather than all carriers.

A. Section 222 Requires That the Same Rights and Obligations Be Applicable to All Telecommunications Carriers.

Several parties argue that Congress and the Commission have often adopted different rules for different classes of carriers.³⁹ Although these parties are clearly correct that the FCC has adopted differential regulatory rules in other areas, there is absolutely no basis in either the statute, the legislative history, or the purpose of Section 222 to make such distinctions here.

³⁵ Second Report and Order at 8098-8099.

³⁶ LCI at 6-11; Comcast at 5.

³⁷ LCI at 11-15; Comcast at 24; CompTel at 10-14.

³⁸ See, e.g., Vanguard at 4-7; TDS at 4-5.

³⁹ CompTel at 12-14; Vanguard at 4-7.

First, the plain language of Section 222 clearly applies equally to all telecommunications carriers, except in two limited instances. Well established principles of statutory construction dictate that the Commission give effect to the precise words of the statute.⁴⁰ This is particularly the case here, where Congress unambiguously used different terms when it intended to adopt regulations that were applicable only to specific classes of carriers.⁴¹ From the language of Section 222, Congress specifically chose to apply CPNI rules equally to all telecommunications carriers, making specific CPNI rules applicable only to LECs (not ILECs) in the treatment of aggregate customer information and subscriber list information, when it determined such differential treatment was warranted. In these circumstances, the

⁴⁰ See, e.g., *Bell Atlantic Telephone Companies v. Federal Communications Commission*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) ("The first traditional tool of statutory construction focuses on the language of the statute."); *Continental Cablevision, Inc. v. Poll*, 124 F.3d 1044, 1049 (9th Cir. 1997) ("This court begins with the 'familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))); *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.*, 975 F. Supp. 329, 331 (S.D.N.Y. 1997) ("Foremost among the canons of statutory construction is the principle that '[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (citing *United States v. Reyes*, 116 F.3d. 67, 71 (2d Cir. 1997))). Vanguard argues that because Section 222(c)(1) recognizes that "different services will have different CPNI," Congress intended that different services would be treated differently. Vanguard at 4-5. Although GTE agrees with Vanguard that carriers should be able to freely market CPE and information services to existing service customers, the language Vanguard cites simply does not say that differential treatment of carriers is permitted. Rather, that section simply defines when any telecommunications carrier can use CPNI where no customer authorization is obtained.

⁴¹ See, e.g., 47 U.S.C. § 251 (Subsection (a) is applicable to all telecommunications carriers, subsection (b) is only applicable to all LECs and subsection (c) is applicable only to ILECs); 47 U.S.C. § 332 (is only applicable to CMRS
(Continued...))

FCC is not free to establish differential rules for different classes of telecommunications carriers.⁴²

Second, the legislative history of Section 222 clearly shows that Section 222 was intended "to balance both competitive and consumer privacy interests with respect to CPNI. New Subsection 222(a) stipulates that it is the duty of every telecommunications carrier to protect the confidentiality of proprietary information"⁴³ Congress adopted this language after it considered and rejected previous versions of the consumer privacy regulation, which had been applicable only to BOCs or had differential treatment based on size.⁴⁴ Thus, Congress clearly examined the issue of differential carrier treatment and elected to impose the same obligations on all telecommunications carriers.

Third, the purpose of Section 222 is to protect consumer privacy. As the Commission indicated in the *Second Report and Order*, consumers' privacy deserves protection no matter what type of carrier possesses it.⁴⁵ Other circumstances where the

(...Continued)
carriers).

⁴² The Commission may in some cases find that technological differences between carriers requires specific findings of what constitutes the elements of the total service package. For example, CMRS technology requires that the CMRS handset must be considered part of the total service package for CMRS. Moreover, the Commission can forbear from applying section 222 in specific instances when Section 10's forbearance criteria are met. Such actions, however, do not justify establishing different rules for different classes of carriers in the first instance.

⁴³ Joint Explanatory Statement at 88 (emphasis added).

⁴⁴ H.R. Conf. Rep. No. 104-458, at 203-04 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 217-18.

⁴⁵ Second Report and Order, ¶ 49.

FCC or Congress have adopted different carrier treatment are simply not relevant. And, as demonstrated in the next section, unequal application of section 222 would not be competitively neutral as contemplated by Congress. Therefore, the language, history and purpose of the statute, to protect consumer privacy in a competitively neutral manner, requires that the Commission maintain equal treatment for all carriers.

B. Adoption of Differential CPNI Rules Is Anticompetitive.

Several parties claimed that ILECs have access to unique customer information and make the argument that such ILECs can use the CPNI they gained as monopoly providers of local exchange service to disadvantage competitors. The Commission should reject this argument.

Placing more onerous conditions on ILECs than on others would clearly be anticompetitive. Allowing ILECs, like others, to make reasonable uses of CPNI to market additional services, promotes competition by increasing consumer information and options. Eliminating such use, hobbles the ILEC as a market participant and provides other carriers with marketing advantages that will distort the competitive marketplace and harm consumers. MCI's proposal that ILECs be prohibited from using intraLATA toll CPNI to market long distance services to customers is one example of the way in which anticompetitive consequences would arise if the Commission were to adopt differential rules.⁴⁶ MCI argues that interexchange carriers, on the other hand, should be able to use interLATA toll CPNI to market intraLATA toll services or vice versa. There is no justification for such unbalanced regulation. MCI made no showing

⁴⁶ MCI at 47-48.

that ILEC use of toll CPNI will advantage them in the long distance market any more than interexchange carriers would be advantaged in the intraLATA toll market through the Big Three IXC's control of the overwhelming majority of the interLATA toll market. Moreover, MCI has made no showing of how it would even be possible for GTE or other IXCs to "stifle competition" in the long distance market. That market is characterized by the presence of large, established, well-funded firms that own long distance transmission capacity much greater than current market demand. Under these circumstances there is no credible scenario by which GTE could obtain market power in long distance markets, regardless of its use of intraLATA toll CPNI for long distance marketing. The Communications Act demands that all consumers benefit from vigorously competitive markets unhampered by regulations that favor one group of competitors over another. The Commission should resist adopting such lopsided, anticompetitive proposals.⁴⁷

What's more, there is no support for the assertion that ILECs possess unique information or that they will be able to abuse CPNI to disadvantage competitors. There is nothing unique in the type of customer information that ILECs possess.⁴⁸ The

⁴⁷ The FCC should also reject MCI's request that carriers be prohibited from passing CPNI or carrier proprietary information back and forth between affiliates or third parties in such a way that destroys its protection. MCI at 53-54. This suggestion is nonsense. The FCC should refrain from adopting rules based on hypothetical situations, especially here where MCI has not even indicated how a carrier could avoid Section 222's requirements through such convoluted means. Sharing information among affiliates is irrelevant as long as the customer expects such sharing as part of the total service package on there is express customer authorization.

⁴⁸ Although it is true that ILECs have CLEC information with regard to their purchase of unbundled network elements, this information is not governed by Sections 222(c) or (d), since this information exists because of the carrier-to-carrier relationship,

(Continued...)

information possessed by ILECs is not different in kind from what competitors acquire and use on a daily basis. In addition, these parties have utterly failed to indicate the way in which ILEC use of CPNI can be anticompetitive.⁴⁹ For these reasons, the Commission should reject LCI's and CompTel's request that ILECs obtain *written* approval from customers prior to using CPNI to market services outside the total service package or when dominant carriers share information with non-dominant affiliates and give more frequent customer notification of consumer privacy rights. The same customer approval and notification requirements are sufficient for all types of carriers. There is no showing that ILECs will misuse CPNI any more than any other carriers. Without such a showing there is absolutely no record basis to adopt such one-sided requirements.

III. THE ELECTRONIC TRACKING AND AUDITING MECHANISMS ADOPTED BY THE COMMISSION ARE EXTREMELY BURDENSOME AND ARE UNNECESSARY TO PROTECT CONSUMER PRIVACY.

The *Second CPNI R&O* orders all carriers to create, install, and maintain electronic audit mechanisms that track access to customer accounts.⁵⁰ These electronic systems must be capable of recording whenever customer records are

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not the carrier-to-customer relationship within the meaning of Section 222(f)(1)(A). Section 222(b) already protects carrier proprietary information from use for marketing purposes.

⁴⁹ For instance, Comcast asserts that ILECs will be able to use CPNI to target sales of second lines or "DSL Solutions." Comcast Cellular at 23. There is absolutely no basis in the statute to preclude this type of pro-consumer activity. Rather, Comcast is only trying to hobble a competitor so that its own attempts to sell services can be made without competitive threat.

⁵⁰ *Second CPNI R&O* at 8198-8199.

opened, by whom, and for what purpose,⁵¹ and must be capable of storing contact histories for a period of at least one year.⁵² Without exception, every commentor who discussed this aspect of the *Second CPNI R&O* agreed that the electronic tracking and audit requirements would be unduly burdensome, extremely costly, overbroad, and of dubious efficacy in advancing the Commission's stated purposes.⁵³ In the face of such an overwhelming consensus, and for the following reasons, the Commission should repeal its proposed electronic audit rule.

First, the Commission grossly underestimated the cost to carriers of compliance. Therefore, a critical finding on which the rule was based — whether the access documentation will be “overly burdensome” — is incorrect. In the Commission's estimation, “[s]uch access documentation will not be overly burdensome because many carriers maintain such capabilities to track employee use of company resources for a variety of business purposes unrelated to CPNI compliance, such as to document the volume of computer and database use, as well as for personnel disciplinary matters.”⁵⁴ The Commission's analogy, however, ignores the fact that the type of database needed to maintain employee personnel records of other internal matters is simply not on the same scale as the type of database needed to maintain detailed records of each use of customer CPNI.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See 360° Communications at 12, ALLTEL at 8, Ameritech at 9-10, AT&T at 8-13, Bell Atlantic at 22, BellSouth at 20-23, Competitive Telecommunications Association at 21-23, Frontier at 3-5, GTE at 41-42, MCI at 34-43, NTCA at 7-11, TDS Telecommunications at 11-16 and The Independent Alliance at 6-8.

Ameritech, for example, demonstrated that such an electronic audit rule would require Ameritech to expend approximately 20 person-years of programming work to modify its systems, and would create an annual storage requirement in excess of 100 trillion bytes of information.⁵⁵ Ameritech's vast systems would be accessed millions of times each day for purposes that have nothing to do with the *Second CPNI R&O*.⁵⁶ The negative effect of the rule, however, is not limited to large LECs; carriers of all sizes noted that the rule would impose sizable burdens on them.⁵⁷ It does not serve the public interest for the Commission to impose additional costs on carriers, because such costs are invariably passed along to customers.⁵⁸

Second, the electronic tracking and audit rule should be repealed because it is both overbroad and inadequate to effectuate the Commission's stated purposes. According to the Commission, "awareness of this 'audit trail' will discourage unauthorized, 'casual' perusal of customer accounts, as well as afford a means of documentation that would either support or refute claimed deliberate carrier CPNI

(...Continued)

⁵⁴ *Second CPNI R&O* at 8198-99.

⁵⁵ See Ameritech at 8-9.

⁵⁶ *Id.*

⁵⁷ See, e.g., AT&T at 8-13; MCI at 36-38; LCI at 3-6; Sprint at 3-6; TDS Telecommunications at 11-16; Bell Atlantic at 22-23; BellSouth at 20-21; GTE at 41-42; Independent Alliance at 6-7.

⁵⁸ Further, as several commentators noted, the Commission did not properly notice or receive comments on the costs associated with the implementation of tracking software. See, e.g., Competitive Telecommunications Association at 21-23; LCI at 5. Without an adequate factual record, the Commission's conclusion that such implementation would not be overly costly is unsupported.

violations.”⁵⁹ However, as several commentators point out, the Commission’s proposed electronic tracking and audit rule will do nothing to discourage unauthorized, “casual” perusal of customer accounts by carrier employees.⁶⁰

The Commission rules simply cannot prevent every ill use of CPNI. An individual employee seeking to *deliberately* violate the Commission’s “use” rules by obtaining unauthorized or improper access to CPNI could simply falsify the “purpose” for which he or she was seeking the CPNI.⁶¹ Thus, as a means of achieving the Commission’s laudable goal of protecting customer privacy, the electronic tracking and audit requirement adds nothing (other than cost) to the Commission’s general restrictions on the acceptable uses of CPNI.

Indeed, the proposed electronic tracking and audit rule is predicated on the Commission’s unfounded assumption that carriers themselves — as opposed to employees acting against Commission rules — would intentionally seek to violate the Commission’s restrictions on the use of CPNI if no such tracking rule existed. Of course, there is no basis in the record to justify such an assumption.⁶²

In addition to all the other defects in the electronic tracking and audit rule the rule is overbroad. The rule unnecessarily requires carriers to track access to CPNI even where such access is wholly unrelated to marketing, sales, or account inquiry purposes.

⁵⁹ *Second CPNI R&O* at 8198-99.

⁶⁰ See AT&T at 8-13; BellSouth at 21-23; Sprint at 3-6; Ameritech at 9-10.

⁶¹ See *id.*

⁶² See Comments of Competitive Telecommunications Association at 21-23; LCI at 5; Sprint at 3-6; TDS Telecommunications at 11-16.

Yet these contexts are the only contexts in which carriers would even conceivably have an economic incentive to improperly access CPNI.

For this reason, as several commentators requested, in the event that the Commission decides to retain the electronic tracking and audit rule, it should clarify that the rule is limited in nature and applies only when final customer account record systems are accessed for marketing, sales, or account inquiry purposes.⁶³ To further cut back on the rule's overbreadth, the Commission should also restrict application of the electronic tracking and audit rule in other contexts in which it is redundant, such as systems used for pre-processing information, systems with no marketing or sales access, systems that have mechanical blocking implemented, and access to customer accounts for which consent has been documented.⁶⁴

IV. MCI'S REQUEST THAT IT BE PERMITTED ACCESS TO CPNI FOR USE IN MARKETING SHOULD BE REJECTED.

A. A Non-Discrimination Requirement Should Not Be Applied to ILEC CPNI.

MCI has requested that the Commission adopt a non-discrimination right applicable to CPNI. MCI states "where a BOC or other ILEC uses CPNI for marketing on behalf of its interexchange affiliate or discloses CPNI to its affiliate, once it has obtained the customer's oral approval for such use or disclosure, Sections 201(b) and 202(a) require that it transmit CPNI electronically to any other entity" demonstrating

⁶³ See, e.g. Ameritech at 9-10; AT&T at 8-13; GTE at 41-42; MCI at 39-42.

⁶⁴ *Id.*